IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 86

LOUIS ZEMEL,

Appellant,

—v.—

DEAN RUSK, Secretary of State, *et al.*,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

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INDEX

Table of Authorities:

Cases:

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Statement

The American Civil Liberties Union, a non-partisan organization devoted to the protection of the civil liberties granted in the Bill of Rights, respectfully submits its views on the related questions of whether Congress or the President authorized the Secretary of State to prohibit travel to Cuba and whether, if authorized, the prohibition on its face and applied to appellant violates the First and Fifth Amendments.[1]

[1] Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court.

Argument

In view of what the Court has already stated about the constitutional basis of every citizen's right to travel abroad (*Kent* v. *Dulles*, 357 U. S. 116 and *Aptheker* v. *Secretary of State*, 378 U. S. 500), any extended discussion of the importance of the right to travel seems unnecessary. It is sufficient, as a basis for the argument that follows, only to take notice of the increasing importance of travel abroad as a means of individual self-education and enjoyment. Foreign travel by United States citizens is constantly increasing. The day of the occasional traveler to strange places or the grand tour of Europe for the affluent has been replaced by mass travel for education, vacation and commerce. This increasing exercise of a constitutional liberty cannot be curtailed by the Department of State in the absence of express legislation which is within constitutional limits.

I.

Congress has not authorized refusal of passports to visit Cuba.

The two Judges below who ruled that the area restriction was authorized by Congress did not agree on its statutory source. District Judge Clarie appears to have relied on both the 1926 and 1952 Acts. District Judge Blumenfeld relied on the 1926 Act alone and viewed the 1952 Act as not undertaking to create passport disqualification limitations (R. 66-67).[2]

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[2] The Court of Appeals for the District of Columbia Circuit considered the question of Congressional authorization of the area restrictions in *Porter* v. *Herter*, 278 F. 2d 280; *Worthy* v. *Herter*, 270 F. 2d 905; and *Frank* v. *Herter*, 269 F. 2d 245. Certiorari was denied in these cases. 361 U. S. 918. See also *Worthy* v. *United States*, 328 F. 2d 386 (C. A. 5).

A. *The 1926 Act.*—Section 1 of the Act of July 3, 1926, c. 772, §1, 44 Stat. Part 2, 887 (22 U. S. C. 211a), merely repeated the provisions of the Act of August 18, 1856, 11 Stat. 52, 60-61, codified in R. S. 4075, terminating the earlier practice of various officials issuing certificates of citizenship (9 Op. Atty. Gen. 350) and provided that:

> "The Secretary of State may grant and issue passports and cause passports to be granted, issued and verified in foreign countries * * * under such rules as the President shall designate and prescribe for and on behalf of the United States, and no other person shall grant, issue or verify such passports."

The purpose of this statute was to centralize issuance of passports in the Department of State but no authority to withhold passports for use in particular areas is granted or even suggested. Except for wartime restrictions [under the Act of May 22, 1918, 40 Stat. 559, terminating with the end of the emergency on March 3, 1921, 41 Stat. 1359], there was no administrative practice establishing area restrictions which Congress can be said to have adopted in 1926 by providing generally that the Secretary of State, and no other person, "may grant and issue passports". Up to that time the two recognized categories for refusal of passports involved questions of allegiance or illegal conduct (*Kent* v. *Dulles,* 357 U. S. at 127).

Here, as in *Kent* v. *Dulles,* the absence of any legislative history or administrative practice prior to 1926, except the emergency wartime restrictions, prohibits finding any authority in the 1926 Act to establish area restrictions for citizens otherwise entitled to passports.

B. *The 1952 Act.*—Section 215 of the Immigration and Nationality Act (8 U. S. C. §1185) provides for "Travel Control of Aliens and Citizens in Time of War or National

Emergency" and is now in effect under the national emergency proclaimed by Presidential Proclamation No. 3004 of January 17, 1953, 67 Stat. c. 31. Subdivision (b) provides that during the proclaimed emergency it shall be unlawful for a citizen to enter or depart from the United States without a valid passport except as authorized by the President. The purpose of the statute and its predecessors (Acts of May 22, 1918 and June 21, 1941) is to protect the security of our borders in time of war or emergency by requiring permits or passports, unless waived, for all aliens or citizens who wish to enter or depart. Departure or entry if applied for may be refused for sufficient reasons of public security and departure or entry without permit or passport is declared to be criminal conduct (but see *Worthy* v. *United States,* 238 F. 2d 386).

Nothing in the text or legislative history of the 1952 Act or its predecessors discloses a Congressional intent to authorize imposition of area restrictions upon citizens otherwise eligible for passports who desire to go to foreign places not approved by the Department of State. Presidential Proclamation No. 3004 invoking §215 makes no reference to area restrictions. The prior regulations of the Secretary of State (22 C. F. R. 53.1-53.9)[3] incorporated in the proclamation make no reference to area restrictions. As Judge Blumenfeld noted below (R. 66), the Secretary has not relied on §215 for area control authority but rather on the 1926 Act which is the only statute expressly invoked in Public Notice 179, 26 F. R. 492, issued January 16, 1961, restricting travel to Cuba.

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[3] The present §53.8 of the regulations, added in 1958 as a cautious reservation, provides that these regulations pursuant to the 1952 Act shall not be construed to prevent exercise of discretion to restrict use of passports to certain countries referred to in §51.75.

Moreover, §215 does not make it an offense to travel to a prohibited area without a passport valid for that area. Congress presumably would have done so if it had authorized area restrictions as well as prohibiting entry or departure without a passport.

C. *Relevant Factors After 1952.*—An additional weighty consideration against construing either the 1926 Act or 1952 Act as authorizing area restrictions is Congress' steadfast refusal to grant this authority although expressly urged to do so. Immediately following this Court's decision in *Kent* v. *Dulles* on June 16, 1958, President Eisenhower on July 7, 1958 in a message to Congress (104 Cong. Rec. 1832) recommended that the Secretary of State be given clear statutory authority to exclude designated areas from permitted foreign travel. Many bills have been introduced to obtain such authority (e.g. S. 2287 introduced by Senator Fullbright in the 86th Cong., 1st Sess.) but no action has been taken. This is surely persuasive evidence that Congress has not granted the requested authority.

Finally, judicial approval of the claimed general authority over areas of foreign travel would permit extensive exercise of that authority without the restraint or guidance which would be provided by Congress in any specific grant. Absent such a specific grant of authority and the legislative standards which would properly accompany the grant and limit its exercise, the Court should not determine that Congress by a general grant of authority to issue passports has sanctioned, without any legislative standards, area restrictions on the constitutional right of foreign travel. Consideration of the constitutional questions inescapably involved in legislative restraint of personal liberty should be postponed until Congress has acted specifically with all the relevant considerations before it. This case, as *Kent*

v. *Dulles, supra,* calls for application of the rule that constitutionally dubious constructions of Acts of Congress will be avoided.

II.

The President has not exercised, and does not possess, independent constitutional authority to ban travel to Cuba.

Although the two opinions below upholding the ban on travel to Cuba do not rely on executive authority apart from statute, the government's answer invoked "the inherent power of the executive over foreign affairs" (R. 8) also discussed in *Worthy* v. *Herter, supra.* It is submitted that several considerations forbid the conclusion that the area restriction is a valid exercise of the power of the Executive to deal with foreign affairs.

A. *Executive Power Not Invoked.*—The passport regulations of the President (Executive Order No. 7856, 3 F. R. 799, March 31, 1938, now contained in 22 C.F.R. 661, Passports, Subpart A—Regulations of the President) which recite that they are based upon 22 U. S. C. 211a, provide that passports shall be granted by the Secretary of State "under such rules as the President shall designate and prescribe for and on behalf of the United States * * *".[4] Thus it appears that the President's passport regulations (including §51.75 authorizing the Secretary to restrict a passport's use in certain countries) are based on the general statutory authority of the 1926 Act, rather than

[4] 22 C. F. R. Part 53—"Travel Control of Citizens and Nationals in Time of War or National Emergency" recites as authority §215 of the 1952 Act (8 U. S. C. 1185) and deals with departure from or entry into the United States.

on any inherent Executive power to provide such regulations. Since there has been some Congressional action in this area, though only a general authority to grant passports under Presidential regulations, it should require a very clear showing, which is absent here, that the President also exercised inherent Executive power to issue the same regulations instead of requesting further legislative authority if that already granted was thought insufficient. To base the Presidential regulations on the 1926 Act excludes any attempt to base them also upon inherent Executive power at least in the absence of an explicit assertion by the President in the regulations that executive power was being exercised.

B. *Executive Power Non-Existent.*—In *Kent* v. *Dulles, supra,* this Court not only determined that freedom of foreign travel is included within the liberty guaranteed by the Fifth Amendment, but also ruled that if that liberty is to be regulated "it must be pursuant to the law-making functions of the Congress", citing *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U. S. 579, in which the nature and extent of the executive power granted by the Constitution was fully expounded in several opinions. Thus this Court has already rejected the contention that refusal of a passport is an exercise of Executive power. The Court distinguished the attempted restriction, as here, on a constitutional liberty of an individual citizen from the wholly different situation "dealing with political questions entrusted to the Chief Executive by the Constitution" such as representing the United States in dealing with foreign powers generally, or in the exercise of specific constitutional powers to make treaties with the concurrence of two-thirds of the Senators present, or to appoint ambassadors with the advice and consent of the Senate (Article II, §2).

The President's role in representing the nation in the conduct of foreign relations cannot be transmuted into a constitutional power to abridge the exercise of a personal liberty which itself is granted by the Constitution. Any judicial accommodation of governmental power over foreign affairs to the constitutional liberty of individual foreign travel must take into account the dominant constitutional role of Congress in regulating commerce with foreign nations, declaring war, and generally establishing the policies which govern the external as well as the internal affairs of the nation. The judiciary must require the dominant legislative power to be exercised before determining whether or not it intrudes unconstitutionally upon the individual liberty of foreign travel. It is submitted that there is no executive power alone granted by the Constitution which authorizes curtailment of the liberty to travel granted by the Constitution.

III.

The ban on appellant's travel to Cuba is unconstitutional.

Denial of a passport valid for Cuba, if authorized, is unconstitutional because no sufficient public interest is shown to warrant this curtailment of the constitutional liberty of movement. *Aptheker* v. *Secretary of State, supra.* Two of the judges below who held that the area restriction was authorized and thus reached the constitutional question, stated that the ban was a reasonable and constitutional means to prevent our citizens from becoming involved in "international incidents" (R. 66) on the territory of a nation with which we have severed diplomatic relations and which might require some governmental action to assure the safety of our citizens (22 U. S. C. §1732). Of course, a citizen traveling abroad may be-

come involved in an incident resulting in his imprisonment, whether or not the foreign government involved is recognized by the United States. But even in the absence of diplomatic relations peaceful avenues of protest are available through third governments, such as the Swiss government in the case of the United States and Cuba, and other methods short of war are available to the United States through its diplomatic and economic power to secure justice for a citizen unjustly imprisoned. The possibility that the lack of diplomatic relations will impede negotiations in the exceptional case of a citizen unjustly imprisoned is not sufficient reason to restrict the constitutional liberty of all prospective travelers to Cuba. All travel cannot be banned because of the possibility that one or a few might be unjustly imprisoned. Constitutional liberty is too precious to be suppressed because of official fears of embarrassment or inconvenience in the course of its exercise.

This judicial justification for the ban is too insubstantial to be the real reason behind the prohibition. The practical basis for the prohibition apparently is the desire of the Department of State to discourage communication with Cuba by citizens of the United States and other countries as part of our foreign policy. Obviously our foreign policy in respect to Cuba lawfully affects individual interests insofar as it limits trade with Cuba. But here the interest affected is not merely commercial but the liberty of personal movement protected by both the First and Fifth Amendments, and no public interest is shown to justify the suppression of the constitutional right of personal travel to Cuba.

Finally, the statutory authority relied upon constitutes an unconstitutional delegation of legislative power to the President and the Secretary of State because no discernible

standard for its exercise is expressed. *Kent* v. *Dulles, supra,* at 129. The 1926 Act, which merely provides that the Secretary of State may grant and issue passports under such rules as the President shall designate, does not supply any standard for the regulation here involved. Even the most liberal application of the constitutional rule prohibiting delegation of legislative power is not satisfied, and for this separate reason the prohibition on travel to Cuba is unconstitutional.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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